**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| United States of America,<br>Plaintiff,<br>v.<br>Robert Wilson Stewart, Jr.,<br>Defendant. | CR-00-0698 PHX ROS<br><br>**Order** |

Pending before the Court is Defendant's Motion to Suppress Evidence (Doc. #35). Plaintiff responded, and Defendant replied. A hearing on the Motion was held on January 29, 2001.

**Background**

On June 14, 2000, Magistrate Judge Morton Sitver issued a search warrant authorizing Special Agent Lawrence Bettendorf ("the affiant") and any authorized officer of the United States to conduct a search at Defendant's residence. The warrant permitted the seizure of firearms, ammunition, and firearm parts or components that would be used to manufacture firearms. The affidavit prepared and filed by the affiant in connection with the warrant stated that its purpose was to permit seizure of items relating to violations of 18 U.S.C. § 922(a)(1)(A) (engaging in the business of manufacturing and dealing firearms without a license) and 18 U.S.C. § 922(g)(1) (felon shipping/possessing a firearm affecting interstate commerce). The firearm, under these statutes, was a Maadi-Griffin .50 caliber rifle which was manufactured pursuant to parts kits sold by Defendant. The affiant set forth that he received information from Bureau of Alcohol, Tobacco and Firearms ("ATF") Regulatory Inspectors that Defendant was engaged in the business of selling firearms parts kits and "[t]hese kits are used to manufacture Maadi-Griffin

.50 caliber rifles. The kits include all parts necessary to complete the rifle, including the trigger assembly, bolt assembly, receiver, and barrel. The receivers need to have two slots cut out before assembly. The slots are partially machined in the receiver, so no template is required."

The affidavit also stated that on April 6, 2000, the affiant purchased the April 17, 2000 edition of "Shotgun News" magazine, and on the front page was an advertisement for the Maadi-Griffin Company, which listed Defendant's residence as the company's address. The advertisement announced that the Maadi-Griffin Company was offering for sale "Model 89 .50 caliber rifle parts kits", that "the firearms receiver is 75% complete", and that "it takes approximately 30 minutes to make the necessary modifications to the receiver." The same day that the affiant purchased the magazine, he reviewed information printed from the Maadi-Griffin website. The website also listed Defendant's address as the Maadi-Griffin address. Both the "Shotgun News" magazine and the Maadi-Griffin website listed the same telephone number for the Maadi-Griffin Company.

The affiant then reported that on April 17, 2000, he received certified court records from the United States District Court for the District of Utah stating that on January 24, 1994, Defendant entered a plea of guilty to possession and transfer of a machinegun in violation of 18 U.S.C. § 922(o). Continuing, the affiant states that on April 18, 2000, an undercover agent ("UCA")[1] made a telephone call to the number listed in the "Shotgun News" advertisement for the Maadi-Griffin Company, and an unidentified male answered the phone, who later identified himself as Bob Stewart. The UCA gave Defendant a telephone number where the UCA could be reached, and shortly thereafter, Defendant telephoned the UCA. During their conversation, Defendant told the UCA that he only sells parts kits without finished receivers at his location, but that the kit "is an almost fool proof unit, and that it only goes together one way." Defendant also told the UCA that "it is very simple to build . . . that the units are pre-welded, and all that needs to be done to complete the manufacturing is to mill out an L-shaped slot on the receiver for the bolt handle." Defendant told the UCA that the receiver could be taken to a machine shop for completion, but that a machinist would not need to read "any instructions because grooves are cut in the metal where the finishing cuts have to be made[,]" and that the cuts could be "easily complete[d]" by any

[1] The UCA was a Special Agent for the ATF and was not specifically identified by the affidavit.

mill operator. Defendant also told the UCA that his company, JNS Supply Company, sells "complete" parts kits with finished receivers, and these "complete" kits were for sale at JNS Supply Company's airport location.

Then, according to the affidavit, on April 20, 2000, the UCA arranged a meeting with Defendant at Defendant's residence. During that meeting, Defendant showed the UCA approximately 6 to 8 parts kits and showed the UCA where to mill out the receiver, stating that "no template was necessary." The UCA then purchased a .50 caliber parts kit from Defendant. Defendant told the UCA that assembly of the kit would be "simple", and Defendant provided the UCA with a book describing how to assemble the kit. To the UCA, Defendant mentioned a conversation he had with an ATF agent wherein the ATF agent expressed to Defendant a concern that the receiver could be readily converted into a firearm. Defendant told the UCA that he '"blew him off', and that it does not make any difference if it is easy or difficult to convert the receiver."

The affiant submitted the parts kit purchased by the UCA to the ATF Firearms Technology Branch to determine if it met the definition of a firearm pursuant to 18 U.S.C. § 921(a)(3). On June 1, 2000, the affiant received a Report of Technical Examination performed by Firearms Enforcement Officer Curtis Bartlett ("Bartlett"). The affiant reported in the affidavit that Bartlett was able to make the necessary cuts as Defendant instructed in approximately 35 minutes with a Dremel hand grinder. Bartlett then completely assembled the rifle and successfully test fired it using a primed .50 caliber cartridge casing. Bartlett determined that the parts kit "was designed to and may be readily converted to expel a projectile by the action of an explosive, thereby making it a firearm" pursuant to 18 U.S.C. § 921(a)(3). On June 7, 2000, the affiant checked ATF's licensing records and found no records showing that Defendant was licensed to sell or manufacture firearms.

The search warrant was executed on June 16, 2000. During the search, ATF agents discovered and seized numerous components of the parts kits and over thirty completely assembled and functional firearms, including a .357 magnum caliber revolver and several machineguns.

Defendant was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and unlawful possession of a machinegun in violation of 18 U.S.C. § 922(o). According to the indictment, these charges are based upon Defendant's possession of one completely assembled revolver

and five completely assembled machineguns, not his possession of the parts kits.

**Discussion**

Defendant argues that the search warrant was invalid because 18 U.S.C. § 921(a)(3), which provides in pertinent part that "[t]he term 'firearm' means . . . any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive[,]" is unconstitutionally vague.[2] He alternatively argues that the affidavit supporting the search warrant lacked probable cause, because it did not provide any evidence from which Magistrate Sitver could evaluate whether § 921(a)(3) was violated. Defendant also argues that the affidavit for the search warrant contained false and misleading information as well as material omissions which amounted to a reckless disregard for the truth, and for this reason, Defendant sought a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1979), and the suppression of evidence obtained from his residence. The Court denied Defendant's request for a Franks hearing during the hearing held January 29, 2001. The reasons for this decision are explained below.

**I. The Exclusionary Rule.**

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The evolution of the exclusionary rule reflected in a series of decisions culminated in 1961 with Mapp v. Ohio, 367 U.S. 643 (1961), in which the Supreme Court announced the rule, which then became the primary instrument to enforce the commands of the Fourth Amendment. "The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against

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[2] At the hearing held January 29, 2001, Defendant argued that the statute was vague on its face and as applied. However, in a legal brief filed February 2, 2001, Defendant cited several cases for the proposition that statutes which do not involve the First Amendment may only be challenged for vagueness as applied. See United States v. Powell, 423 U.S. 87, 92 (1975) (statutes not involving First Amendment freedoms may be challenged for vagueness only as applied); see also San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121, 1132 (9th Cir. 1996).

unreasonable searches and seizures[.]'" United States v. Calandra, 414 U.S. 338, 347 (1974). "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." Illinois v. Krull, 480 U.S. 340, 347 (1987) (cites omitted).

Since the rule was adopted in 1961, the Supreme Court has cultivated its scope, and began evaluating and balancing the rule's effectiveness in deterring a Fourth Amendment violation against its societal costs. See Tom Stacy, The Search for Truth in Constitutional Criminal Procedure, 91 Colum. L. Rev. 1369, 1440 n.292 (1991). In Krull, the Supreme Court held that "application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." Krull, 480 U.S. at 347. The Supreme Court reaffirmed this pivotal analysis in United States v. Leon, 468 U.S. 897, 918 (1984), holding that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Accord, United States v. Luk, 859 F.2d 667, 671 (9th Cir. 1988) ("[T]he link between suppression and the deterrence of unconstitutional conduct should be closely scrutinized, and when deterrence is attenuated or slight[,] suppression should be disfavored.") (citing Krull, 480 U.S. at 347). In harmony with this analysis is the Supreme Court's holding that the exclusionary rule is inapplicable to both civil and grand jury proceedings. See United States v. Janis, 428 U.S. 433, 454 (1976); Calandra, 414 U.S. at 351-52.

Of particular relevance to whether the exclusionary rule should be applied to this case is the Supreme Court decision of Michigan v. DeFillippo, 443 U.S. 31, 33 (1979), where the Court decided if the exclusionary rule should be applied when an officer makes an arrest "in good-faith reliance" on a substantive ordinance later declared unconstitutional on vagueness grounds. In DeFillippo, police officers arrested DeFillippo for failing to identify himself in violation of § 39-1-52.3 of the Code of the City of Detroit ("the ordinance"). Id. The officers searched DeFillippo incident to his arrest and found a package of marihuana as well as a tinfoil packet later determined to contain another controlled substance, phencyclidine. Id. at 34. DeFillippo was charged with possession of a controlled substance but not with a violation of the ordinance. Id. DeFillippo moved to suppress the evidence obtained during the search on the ground that the ordinance which provided the basis for the arrest was unconstitutionally vague. Id.

During an interlocutory appeal, the Michigan Court of Appeals held that the ordinance was unconstitutionally vague, and as a consequence, that the arrest and search incident to the arrest were invalid. Id.

The United States Supreme Court reversed the Michigan Court of Appeals, holding that "[t]he validity of the arrest does not depend on whether the suspect actually committed a crime; . . . ." Id. at 36. Finding that the officer who arrested DeFillippo had "abundant probable cause" to believe that DeFillippo had violated the ordinance, the Court then shifted the focus to address "whether, in these circumstances, it can be said that the officer lacked probable cause to believe that the conduct he observed and the words spoken constituted a violation of law [the ordinance] simply because he should have known the ordinance was invalid and would be judicially declared unconstitutional." Id. at 36-37. To that question, the Supreme Court stated that "[t]he answer is clearly negative." Id. at 37. Acknowledging that at the time of DeFillippo's arrest "there was no controlling precedent that [the] ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance[,]" the Supreme Court held that a prudent officer "should not have been required to anticipate that a court would later hold the ordinance unconstitutional." Id. at 37-38 (emphasis added). It then stated:

> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality--with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill- served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Id. at 38 (emphasis added).

The DeFillippo Court found that the purpose of the exclusionary rule would not be served by suppressing evidence seized as a consequence of officers acting pursuant to a presumptively valid statute. It stated:

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

Id. at 38 n.3 (emphasis added). It emphasized that merely because the ordinance was, subsequent to the arrest, determined constitutionally invalid "on vagueness grounds does not undermine the validity of the

arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed." Id. at 39.

Embracing again the interpretation of the exclusionary rule adopted in DeFillippo, the Supreme Court further refined its scope by extending it to when an officer objectively and reasonably relies on a search warrant issued by a detached and neutral magistrate, even if the warrant is ultimately found to be defective. Leon, 468 U.S. at 922-23.[3] In Leon, the Supreme Court solidified the principal that the application of the exclusionary rule calls for an assessment of its deterrent effect on the behavior of law enforcement. It held that the exclusionary rule was not designed to punish the errors of judges and magistrates, concomitantly "an officer cannot be expected to question the magistrate's probable cause determination[.]" See id. at 916, 921; see also Krull, 480 U.S. at 349 ("It is the judicial officer's responsibility to determine whether probable cause exists to issue a warrant, and, in the ordinary case, police officers cannot be expected to question that determination."). The Court reasoned that if the magistrate has made an error in finding probable cause, "[p]enalizing the officer . . . cannot logically contribute to the deterrence of Fourth Amendment violations." Leon, 468 U.S. at 921.

What after Leon is now referred to as the "good faith" exception to the exclusionary rule was expanded by the Supreme Court to acts by law enforcement in objectively reasonable reliance on a statute. Krull, 480 U.S. at 349-50. The Court in Krull stated:

> The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in Leon: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."

Id. (emphasis added). As in DeFillippo, the Supreme Court recognized that punishing law enforcement officers for errors of the legislature did not serve the objectives of the exclusionary rule. "[L]egislators, like

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[3] The analysis and holding of DeFillippo were expressly reaffirmed by the Supreme Court in Leon, 468 U.S. at 911-12, 913 n.8.

judicial officers, are not the focus of the [exclusionary] rule." Id. at 350. Laws are accorded a presumption of constitutional validity, and "courts presume that legislatures act in a constitutional manner." Id. at 351.

> Legislators enact statutes for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations. Thus, it is logical to assume that the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute, as happened in this very case. There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent.

Id. at 352 (emphasis added).

The decision in Krull differed from DeFillippo in that the officers in Krull sought a search warrant based upon a statute which was later declared unconstitutional because it was procedurally deficient. In contrast, in DeFillippo, the ordinance which provided the basis for the arrest was subsequently declared unconstitutional. Further, in Krull the Supreme Court retreated from, if not abandoned, the distinction in DeFillippo between substantive and procedural statutes which are declared unconstitutional. The Krull Court found that there was no valid reason to distinguish between procedural or substantive statutes, and that the issue for application of the exclusionary rule after Leon was whether an officer had reasonably relied upon the statute. The Supreme Court resolved that objectively reasonable reliance by an officer on a statute depends upon whether a "reasonable officer should have known that the statute was unconstitutional." Krull, 480 U.S. at 355. The Supreme Court held:

> In either situation, application of the exclusionary rule will not deter a violation of the Fourth Amendment by police officers, because the officers are merely carrying out their responsibilities in implementing the statute. Similarly, in either situation, there is no basis for assuming that the exclusionary rule is necessary or effective in deterring a legislature from passing an unconstitutional statute. There is no basis for applying the exclusionary rule to exclude evidence obtained when a law enforcement officer acts in objectively reasonable reliance upon a statute, regardless of whether the statute may be characterized as "substantive" or "procedural."

Id. at 355 n.12 (emphasis added).[4]

In the instant case, Defendant argues that the search warrant is invalid because 18 U.S.C. § 921(a)(3), which provides in relevant part that "[t]he term 'firearm' means . . . any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive[,]" is unconstitutionally vague because the phrase "may readily be converted" is not defined by statute. Defendant cites United States v. 16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns, 443 F.2d 463 (2d Cir.) ("Molso"), cert. denied, 404 U.S. 983 (1971), in support of his contention that § 921(a)(3) is unconstitutionally vague.

The Court finds that even if 18 U.S.C. § 921(a)(3) were unconstitutionally vague, invoking the exclusionary rule to suppress evidence seized as a result of the execution of the search warrant based in part on this statute would be contrary to the law, because the remedial purposes of the exclusionary rule would not be served. See Krull, 480 U.S. at 347-50; Leon, 468 U.S. at 918. Defendant does not argue nor does the record support that the affiant of the warrant was unreasonable, either objectively or subjectively, in relying upon § 921(a)(3).[5] In addition, unless § 921(a)(3) is not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws[,]" DeFillippo, 443 U.S. at 38, or is "clearly unconstitutional[,]" Krull, 480 U.S. at 349-50, the exclusionary rule can not be

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[4] Since the analysis of the application of the exclusionary rule has evolved to center on a determination of the good faith of law enforcement officers, the Seventh Circuit in a section 1983 action addressed whether an arrest for violating a statute can be challenged under the Fourth Amendment by attacking the validity of the statute upon which the arrest was premised. In Ryan v. County of DuPage, 45 F.3d 1090, 1094 (7th Cir. 1995) (citing both DeFillippo and Krull), the court held that "[i]f there is probable cause to believe that the defendant has committed a crime by violating some rule, the rule's invalidity, while a defense to a conviction for the crime, is not a ground for his challenging the arrest for violating the rule under the Fourth Amendment, unless the invalidity of the rule was or should have been plain to the arresting officers." See also United States v. Dexter, 165 F.3d 1120, 1125 (7th Cir. 1999) (holding that even if a statute authorizing a stop was unconstitutional as applied, suppression was not justified because the officer reasonably relied on the statute when he determined there was a violation) (citing DeFillippo and Krull).

[5] Compelling evidence of the objective/subjective good faith of the law enforcement officer is also demonstrated because of substantial evidence of probable cause set forth in the warrant that the kit was readily convertible to a firearm, most notably Defendant's own admissions. See discussion infra at 14. Also, there is no evidence or even a suggestion that the Magistrate acted in anything other than a detached and neutral capacity when he authorized the search warrant. See Leon, 468 U.S. at 913-14.

applied to actions taken by, or the behavior of, law enforcement. Application of these principles clearly demonstrates that the decisional law evinces the constitutionality of § 921(a)(3). In United States v. Quiroz, 449 F.2d 583, 585 (9th Cir. 1971), the Ninth Circuit upheld 18 U.S.C. § 921(a)(3) on its face holding that the statute gives fair warning regarding the nature of the proscribed conduct. See United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (if a statute "conveys sufficiently definite warning as to the proscribed conduct[,]" the statute is not unconstitutionally vague). Further, the only case cited by Defendant and which the Court has found interpreting the constitutionality of § 921(a)(3) and employing an as applied vagueness analysis found the statute constitutional. See Molso, 443 F.2d at 466. Defendant argued that Molso is distinguishable from this case because the Second Circuit found the starter gun convertible in twelve minutes which is less time than was set forth in the affidavit for the conversion of Defendant's kits. Even assuming, without deciding, the Molso firearms were more quickly convertible than Defendant's kits, it would be highly unreasonable to require law enforcement officers to be conversant with the hairline distinctions between this case and a Second Circuit decision of negligible value.[6]

Application of the exclusionary rule to this case would be antithetical to the principal reason for the rule, which is deterrence of unconstitutional law enforcement behavior.[7] Because there is "no controlling precedent" declaring 18 U.S.C. § 921(a)(3) unconstitutional, this statute is presumptively valid. DeFillippo, 443 U.S. at 337. The validity of the warrant, subsequent seizure, and indictment based in part on the seized evidence cannot be undermined by the subsequent alleged unconstitutional vagueness of the statute. See id. at 40. Accordingly, the Motion to Suppress will be denied on the issue of the constitutionality of 18 U.S.C. § 921(a)(3).

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[6] "Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by law enforcement officers concerning its constitutionality . . . Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." DeFillippo, 443 U.S. at 38.

[7] After the hearing on this motion, the Court invited the parties to provide supplemental briefing regarding the burden and the standard of proof applicable to an as applied vagueness analysis. In view of the Court's determination that the exclusionary rule is inapplicable, this issue is moot. It is noteworthy, however, that the Supreme Court in United States v. Mazurie, 419 U.S. 544, 552-53 (1975), held that exacting proof of the definition of precise words of a statute and the application of those words to the facts of each case is not required.

## II. Franks Hearing.

At the hearing held January 29, 2001, the Court denied Defendant's request for a hearing under Franks v. Delaware, 438 U.S. 154 (1978). In Franks, 438 U.S. at 155, the Supreme Court addressed the circumstances in which a defendant in a criminal proceeding may challenge the truthfulness of factual statements contained in an affidavit made in support of a warrant. It held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Id. (emphasis added).

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id. at 171-72 (emphasis added).

"[A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." Franks, 438 U.S. at 165. "Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause," and great deference is accorded to a magistrate's determination. Leon, 468 U.S. at 914. That deference "is not boundless." Id. "[R]eviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" Id. at 915 (cite omitted). "Even if the warrant application was supported by more than a 'bare bones' affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was

improper in some respect." Id. (cite omitted).

At the hearing, argument was held concerning the necessity of a Franks hearing. Defendant's counsel alleged that the affiant's affidavit contained false and misleading statements and omitted material information, and even if those statements and omissions did not occur, probable cause still would not exist. (Reporter's Transcript ("R.T.") 1/29/01 at 3). The Court then asked counsel to explain why there would not be probable cause if the alleged false statements were redacted and omissions were cured, and the following colloquy ensued:

> MR. VICTOR: Well, for starters, Your Honor, there's absolutely no information in the affidavit anywhere regarding the amount of time that was required to convert this parts kit into something that their expert ultimately concluded was a firearm.
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> THE COURT: Well, let me stop you for a moment.
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> As you know, and as you pointed out, your client told the undercover agent that the weapon was foolproof. He gave information which would have led a person to believe, perhaps, that it was readily convertible. And again, of course, this is not a trial on the merits for a potential violation of 922; this is a question as to whether or not there was probable cause, which is a reduced standard.
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> MR. VICTOR: That's correct, Your Honor.
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> Regarding my client's statements, the Government did cite that in their response that my client made some statements, but they didn't back that up with any type of authority that that by itself would be sufficient for a finding of probable cause.
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> I think if you look at my client's statements that were alleged in the affidavit in totality, there's one statement in there that he says the receiver is 75 percent complete, which, of course, would indicate that there's still 25 percent left - - of work left to be done just to the receiver. Also, no indication is made regarding the total assembly time that is needed.
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> In addition to that, my client tells the undercover agent in the affidavit, this is on page 7, he encourages that person to take the receiver to a machine shop to have it done properly.
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> So I don't think - - first of all, I don't think that it's adequate to say that merely because my client, who is at that time selling a weapon to a person and who may say in the course of that dealing, Gee, it's not that hard to assemble, or to put together, something of that nature, I don't think that's sufficient for a magistrate to find under the law that probable cause exists meeting the readily converted aspect of the definition of a firearm.
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> Secondly, I don't think Mr. Stewart, if he in fact even made those statements, his statements taken by themselves indicate that it's readily convertible.

(R.T. 1/29/01 at 4-5).

Defendant argues that if the alleged false and misleading statements were redacted and material

omissions were cured, the affidavit submitted by the affiant to Magistrate Sitver presented no basis upon which it could be determined that the parts kits were firearms pursuant to § 921(a)(3).[8] Defendant also asserts that the affiant failed to inform the Magistrate regarding the amount of time Bartlett expended in assembling the parts kit into a firearm, and he contends that the affidavit was insufficient because it did not include information regarding other types of tools utilized to assemble the parts kit.

Redacting the allegedly false and misleading statements and inserting the omissions into the affidavit, the Court finds the affidavit provided more than a substantial basis to support a determination of probable cause. See Leon, 468 U.S. at 915. Defendant's own alleged statements support a finding of probable cause. See United States v. Matthews, 32 F.3d 294, 298 n.1 (7th Cir. 1994) (probable cause for a warrantless search existed because of the defendant's own statements concerning his possession of an illegal weapon); United States v. Wright, 971 F.2d 176, 180 (8th Cir. 1992) (sufficient probable cause existed to arrest the defendant based upon the defendant's own statements); United States v. Waters, 786 F. Supp. 1111, 1118 (N.D.N.Y. 1992) (defendant's voluntary statements could be used to support a determination of probable cause for a search warrant). The affiant informed Magistrate Sitver that Defendant had advertised that the necessary modifications to the receiver could be made within 30 minutes. Moreover, Defendant explained to the UCA that the parts kits were foolproof, simple to build, would only go together one way, and that only an L-shaped slot needed to be milled on the receiver for the bolt handle in order to complete the manufacturing process. Despite the absence of information in the affidavit concerning the time spent by Bartlett after making the necessary cuts to complete the receiver or concerning the specific tools utilized to assemble the firearm, the particulars set forth in the affidavit still support a determination of probable cause.

In addition, the affidavit supported a determination of probable cause because it stated that Defendant's company, JNS Supply Company, sold parts kits with finished or unfinished receivers. The affidavit stated that Defendant informed the UCA that a parts kit with a finished receiver is a Federal

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[8] Defendant only argues that the affidavit failed to establish probable cause with respect to whether the parts kits were readily convertible. Defendant does not challenge the determination of probable cause with respect to the other elements of the offense, i.e., that he was a convicted felon and that he had no federal firearms license. See Defendant's Reply in support of his Motion to Suppress at 5.

Firearms Licensee ("FFL") parts kit, whereas a "non FFL parts kit receiver requires two slots to be cut out." Defendant allegedly told the UCA that the non FFA parts kits were sold "at his location," but that the FFA parts kits were sold at JNS Supply Company's airport location, that those parts kits are "complete", and that "the receivers have serial numbers." Defendant allegedly offered to help the UCA assemble an FFL kit if the UCA were to purchase an FFL kit. It is undisputed that Defendant is now and was at the time the warrant was issued a convicted felon who is and was prohibited from engaging in the business of manufacturing and dealing firearms without a license, and from possessing any firearm. 18 U.S.C. §§ 922(a)(1)(A) and 922(g)(1).

Finally, other factors also support a determination of probable cause. The affidavit supports a determination that Defendant possessed significant knowledge and expertise concerning laws governing firearms and the firearms kits themselves. Defendant explained to the UCA that the non FFL parts kits could be sold without charging a federal excise tax or a serial number, whereas the opposite was true for the FFL parts kits. Defendant also selected the parts for the parts kit purchased by the UCA and explained to the UCA that the kit could not be assembled "at his shop because that would require an FFL." One of Defendant's employees allegedly told the UCA that "approximately three to five .50 caliber parts kits" were built per day. Moreover, Defendant knew the laws for which he was under investigation because he had previously been convicted of possessing a firearm in violation of 18 U.S.C. § 922.

Accordingly,

**IT IS THEREFORE ORDERED** that the Motion to Suppress Evidence (Doc. #35) is **DENIED**.

DATED this 26th day of February, 2001.

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Roslyn O. Silver
United States District Judge